(A)

No. 97-1495

Supreme Court, U.S.
FILED
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CLERK

In the
Supreme Court of the United States
October Term 1997

Gene Allen: Davenport - Petitioner

VS.

ORVILLE L. COADY - Respondent
Et. al

On Petition For Writ of Certiorari
To The Court Of Appeals
For The Eighth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Gene Allen: Davenport, Pro se

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15

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals depart from the Federal Rules of Civil Procedure, Rule 56 (e) by upholding the Decision of the District Court to deny the Petitioner's Motion for Summary Judgment against Patrick Kenner and Thayer County Bank, when the Motion for Summary Judgment was supported by evidentiary exhibits.

II. Can a District Court Judge rule administratively in a case without a hearing, or without giving Petitioner a Trial by Jury as demanded, and in violation of the Federal Rules of Civil Procedure, Rule 38 (a)?

III. Are the Judges of the Court of Appeals, and District Courts required to follow the Federal Rules of Civil Procedure, the same as Petitioner is?

IV. Whether Patrick Kenner, Thayer County Bank, or the Attorney, Joseph Badami, who represents them, should be allowed any standing before the Supreme Court?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court are as follows:

JOSEPH H. BADAMI
MICHAEL B. LUSTGARTEN
GREGORY C. DAMMAN
SCOTT DANIELS
CHARLES EDWARD LOWE
Patrick Kenner
Orville L. Coady
Albert P. Burnes
Joseph H.Murray
Gary Young
Nancy C.McLaughlin
Lloyd VanCleef

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. i
LIST OF INTERESTED PARTIES. ii
TABLE OF CONTENTS. iii
TABLE OF AUTHORITIES. iv
STATEMENTOF THE CASE. 1
STATEMENT OF ISSUES PRESENTED BY RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK . . 1,2
ARGUMENT 3,4,5

I.
The Supreme Court should grant Certiorari to re-affirm that the Judges of the Court of Appeals, and District Courts are required to follow the Federal Rules of Civil and Judicial Procedure, and their Oaths of Office.

II.
The Supreme Court should grant Certiorari, as this case is of Primary importance to every private citizen of the individual States of the united States of America, who is concerned about the abuses and usurping of authority by our Judges, Attorneys, and Law Enforcement Officers, on a daily basis.

III.
The Supreme Court should not accept the Brief in Opposition of Patrick Kenner, Thayer County Bank, which was prepared by the Attorney,Joseph Badami, who represents them, because of the fact that they, or their agent, did not send any copies of the Brief in Opposition to the Petitioner as stated in the Affidavit of Service.

CONCLUSION 5,6
APPENDIX:

Affidavit of Service . . . . . .Exhibit Page 1
Telecopier Transmittal Sheet . . . . . Exhibit Page 3

TABLE OF AUTHORITIES

CASES **PAGE**

MARBURY VS MADISON 5
HALE V. HINKEL,210 U.S. 43 5

FEDERAL RULES OF CIVIL PROCEDURE **PAGE**

Federal Rules of Civil Procedure . . . . . i, iii,4
Federal Rules of Civil Procedure Rule 38 (a) i,4
Federal Rules of Civil Procedure Rule 56 (e) i,4
F.R.C.P. 7 (c) 4
F.R.C.P 8 (a) (2) 3
Rule 10 3
Supreme Court Rule 10 3

OTHER **PAGE**

Seventh Amendment 4
Title 28 U. S. C. 636 2
Title 28 U. S. C. 636 (A) 6
Title 28 U. S. C. 636(b) 2
Title 28 U. S. C. 636(b)(1)(A)and (B) 2
Title 28 U. S. C. 636(b)(1)(B) 1

Petitioner Gene Allen: Davenport's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter should be granted as it involves very basic Principles of Procedure and Constitutional Law which are of grave concern to the country as a whole.

STATEMENT OF THE CASE

A Writ of Certiorari was filed with the Supreme Court of the United States of America on November 14, 1997, was returned for correction on January 15, 1998, because it was done in the wrong form. Petitioner was given sixty (60) days to put the Writ in proper form.

The corrected Writ of Certiorari was placed on the Docket of the Supreme Court on March 12, 1998.

The NebraskaAssistant Attorney General,Charles E. Lowe, filed a Waiver for Respondent Orville L. Coady on March 20, 1998.

Michael B. Lustgarten, attorney for Respondent Albert P. Burnes, filed a Waiver on March 25, 1998.

Joseph Badami, counsel of record for Patrick Kenner and Thayer County Bank, filed a Brief in Opposition with the Supreme Court on April 8, 1998.

STATEMENT OF ISSUES PRESENTED BY RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK

In the Brief in Opposition of Respondents, Patrick Kenner and Thayer County Bank, the brief, in the Questions presented for review, asks the question:

Whether the referral of Respondents Motion to dismiss to a Magistrate Judge for a report and recommendation, pursuant to Title 28 U.S.C. § 636 (b) (1) (B), violated Petitioner's constitutional rights.

Respondent states in the Brief in Opposition that: "On January 6, 1997, Petitioner, Gene Allen Davenport ("Davenport") filed a "Complaint" in the United States District Court for the District of Nebraska against a Nebraska district court judge, two attorneys, a county sheriff, the clerk of the district court, two Nebraska banks, and the banks' respective chief operating officers. (App. G. infra, 17a-27a). The "Complaint" contained a mish-mash of allegations, accusations, and incorrect and misplaced citations of legal principles. Davenport accused Patrick Kenner and Thayer County Bank.....".

"All of the defendants named in the "Complaint." including Respondents, Thayer County Bank and its chief executive officer, Patrick Kenner [collectively "Thayer County"], eventually moved to dismiss the "Complaint" for failure to state a claim. The motions to dismiss were referred to United States Magistrate David L. Piester for a report and recommendation by United States District Judge Richard G. Kopf pursuant to Title 28 U.S.C. 636 (b) (1) (A) and (B). (App. C, infra, 5a)."

The Respondents state that no compelling reasons why certiorari would be appropriate in this case has been stated by the Petitioner.

Instead, Davenport simply alleges that he was deprived of his "constitutional rights," apparently by the referral of Davenport's motions to dismiss to a magistrate judge for a report and recommendation pursuant to Title 28 U.S.C. § 636.

However, there are many extraneous and unrelated matters, misstatements, and irrelevant contentions set forth in Davenport's petition and appendix, matters that do not appear in the record. The district court in this matter had the statutory authority under Title 28 U.S.C. § 636(b) to refer the motions to dismiss to a magistrate judge for a report and recommendation

ARGUMENT

Supreme Court Rule 10 provides that a petition for Writ of Certiorari will be granted "only for compelling reasons." Supreme Court Rule 10 identifies the following criteria, which indicate the character of the reasons the Court considers in determining whether certiorari is appropriate;

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or **has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (Emphasis added)**

(b) **********

(C) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or **has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Emphasis added)**

Supreme Court, Rule 10, concludes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or for misapplication of a properly stated rule of law."

Thus, Rule 10 sets forth the parameters of when and under what circumstances this Court will consider favorably a petition for writ of certiorari.

The Complaint complied with F.R.C.P 8 (a) (2), by stating a "short and plain statement of the claim, showing that the pleader is entitled to relief". In very short and definitive terms, the Complaint stated

that Plaintiff's GOD Given, and Constitutional Rights had been violated by each Defendant.

Evidence in support of the Complaint was attached to the Motion for Summary Judgment as exhibits as required by Federal Rules of Civil and Judicial Procedure, Rule 56 (e).

I. The Supreme Court should grant Certiorari to re-affirm that the Judges of the Court of Appeals, and District Courts are required to follow the Federal Rules of Civil and Judicial Procedure, and their Oaths of Office.

The Petitioner demanded a Seventh Amendment Trial by Jury, on the front page of the Original Complaint, and this Seventh Amendment Right was denied by the District Court, in violation of the Federal Rules of Civil Procedure, Rule 38 (a).

If Federal Rules of Civil Procedure had been followed by the courts, Petitioner would have received his "day in court", and this whole case could have been resolved by now.

In the Interest of Justice, Petitioner calls to the Court's attention, F.R.C.P. 7 (c) which states: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used".

II. The Supreme Court should grant Certiorari, as this case is of Primary importance to every citizen of the individual States of the United States of America, who is concerned about the abuses and usurping of authority by our "justice system"on a daily basis.

The private citizens, and citizens in general have been denied Due Process of Law at every turn, and the Judges have failed to uphold the Constitution or their Oaths. These actions by the Courts have caused great hardships on the people in general. If private citizens are not allowed equal access to the courts, and the right to counsel of their choice (not always required to be represented by an

attorney who has no oath to the Constitution), our forefathers will surely turn over in their graves. This is not just a concern of Petitioner, but of grave concern to thousands of Americans across this great country.

The Respondents Patrick Kenner and Thayer County Bank, through their Attorney, Joseph Badami, and his agent certified that a copy of their Brief in Opposition had been mailed to Petitioner, when in fact a copy of the Brief had not. As of April 21, 1998 a copy still had not been received. It was not until Petitioner called the court, that Petitioner found out that a Brief in Opposition had been filed. This is just one more example of the underhanded, deceptive, and blatant actions, by so called "Officers of the court", that the average American Citizen must endure every day. Because of this obvious attempt to deceive the Court, the Attorney of Record for Respondents Patrick Kenner and Thayer County Bank should not, now, be allowed any standing before the Supreme Court.

We all ask the same question, "Where is the Justice?"

CONCLUSION

This case is based on the Principle and Foundation established by the Constitution, and reaffirmed in the case of Marbury vs Madison, and re-established in Hale v. Hinkel, 201U.S. 43

Petitioner believes that the Brief filed by Joseph Badami for Respondents Patrick Kenner and Thayer County Bank is nothing more than an attempt to mislead the Court by making false statements concerning the original action.

This action is not about the Constitutional Rights violations in the district court for the District of Nebraska, but is about the fact that Petitioner's Constitutional Rights were violated in the State Courts, and Petitioner was not given the opportunity to redress those violations in the district court for the District of Nebraska, because of the Court not following the Rules of Procedure.

It appears the attorney is attempting to mislead the Supreme Court into believing that the Respondents Patrick Kenner and Thayer County Bank have been falsely prosecuted and have followed all the rules. The Petitioner never has contended that the assignment of the Motions to Dismiss to the Magistrate Judge violated is Constitutional Rights. What petitioner did contend, was that the Magistrate Judge had no authority to act under Title 28 U. S. C. 636 (A)which states:

"a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, **except a motion (Emphasis added)** for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminaj case, to dismiss or to permit maintenance of a class action, **to dismiss for failure to state a claim upon which relief can be granted, (Emphasis added)** and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.", and that Court was in violation of the Federal Rules of Civil Procedure by the Referral.

The petition for a writ of certiorari should be granted.

I, Gene Allen: Davenport, declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Respectfully submitted this 24 day of April, 1998

Gene Allen: Davenport, Private Citizen

Notary

Subscribed and Sworn to before me this 24 day of April , 1998.

by Corwin Powell.

My commission expires 5-4-98

GENERAL NOTARY-State of Nebraska
CORWIN POWELL
My Comm. Exp. May 4, 1998

EXHIBITS

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997
No. 97-1495

----------x

GENE ALLEN DAVENPORT,
Petitioners.

Vs.

ORVILLE L. COADY, Et al.,
Respondents.

----------x

STATE OF NEW YORK
COUNTY OF NEW YORK

I, /s/_____,being duly sworn according, to law and beingover the age of 18, upon my oath depose and say that:

I am retained by Woods & Aitken attorneys for respondents.

That on the 8th day of April, 1998, I served the within Brief in Opposition for Respondents Patrick Kenner and Thayer County Bank in the above captioned matter upon:

Gene Allen Davenport
General Delivery
Belvidere, NE 68135
Petitioner, Pro Se
(402) 768-6429

Michael B. Lustgarten
Lustgarten & Roberts
477 Continental Buiding
209 S. 19th Street
Omaha, NE 68102

Attorney for Albert P. Burnes, Respondent
(402) 346-1920

Gregory C. Damman
P.O. Box 401
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Cleaf, Respondents

Craig A, Knickrehm
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Omaha, NE 68502-8220
Attorney for Gary Young and Nancy C.
McLaughlin Respondent

Charles E. Lowe
Assistant Attorney General
2 1 1 5 State Capitol
Lincoln, NE 68509
Attorney for Orville L. Coady, Respondent

by depositing three copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service.

That on the same date as above, I sent to this Court forty copies of Brief in Opposition for Respondents Patrick Kenner and Thayer County Bank through the United States Postal Service by Express Mail, postage prepaid.

All parties required to be served have been served
/s/_____

APR-21-98 10:38 FROM-WOODS AND AITKEN ID:4024745777 PAGE 1/51

Telecopier Transmittal Sheet
WOODS &AITKEN
Attorneys at Law

URGENT

PLEASE DELIVER IMMEDIATELY
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To: Genc Allen Davenport
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From: Craig C. Dirrim
Comments: See attached

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